No. [redacted]93

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

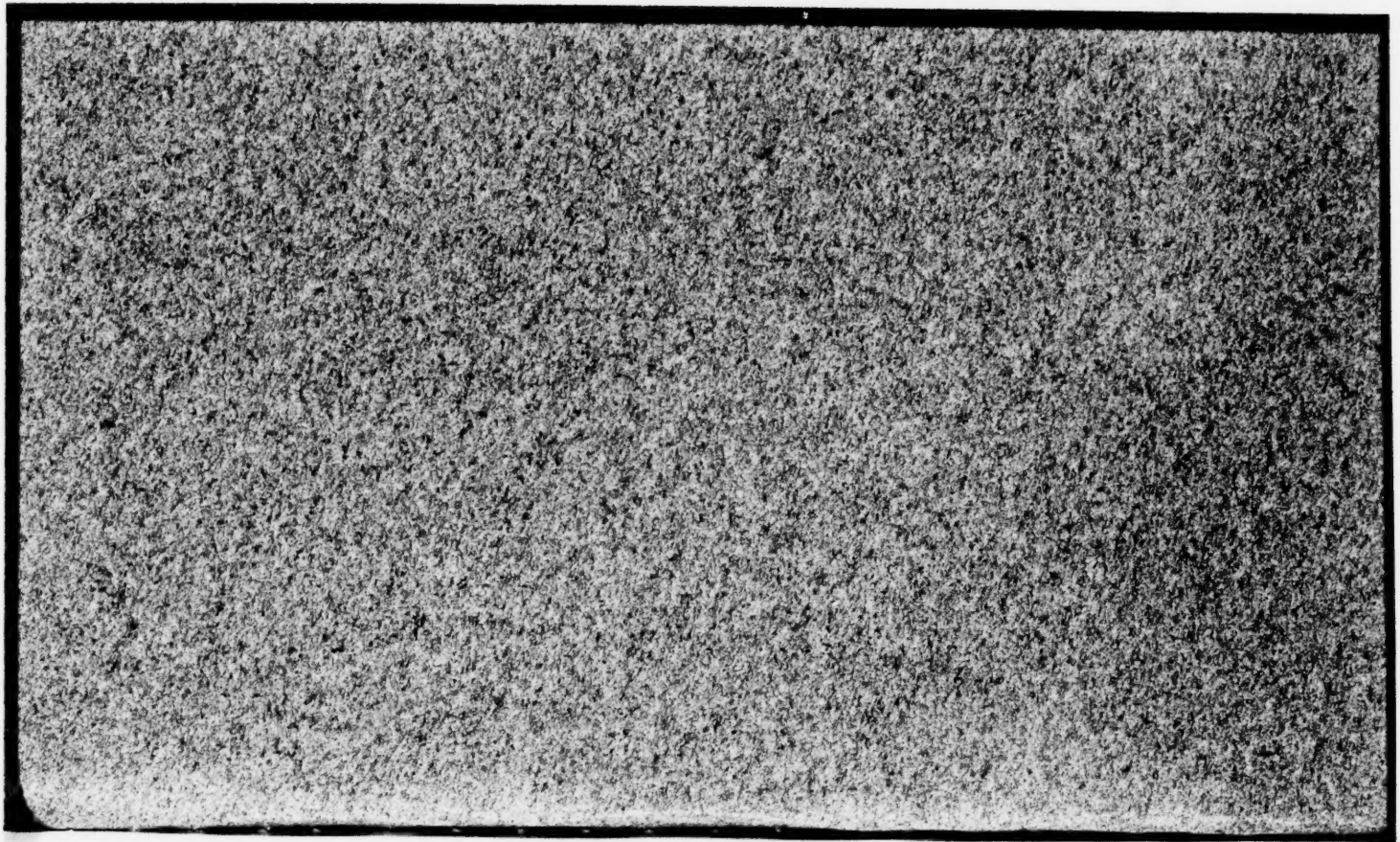
ROBERT E. TOD, COMMISSIONER OF IMMIGRATION,
PETITIONER,

v.

SERJWA WALOMAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1923



In the Supreme Court of the United States.

OCTOBER TERM, 1923.

ROBERT E. TOD, COMMISSIONER OF IMMIGRATION, petitioner,
v.
SZEJWA WALDMAN, ET AL. } No. ____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Comes now the Solicitor General of the United States and on behalf of petitioner prays the Court to grant a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above-entitled cause.

QUESTION INVOLVED.

The question presented is whether when a court, on habeas corpus, finds that an alien has been denied a fair hearing by the immigration officials, it thereupon becomes the duty of said court to discharge the alien or proceed to determine his right to enter the United States under the immigration laws.

52071—23

THE FACTS.

Petitioners were excluded from admission into the United States because one of them was unable to meet the reading test prescribed by the immigration statutes; one was afflicted with a physical defect, and the others were likely to become public charges. (R. p. 9.) They thereupon sued out a writ of habeas corpus, alleging various grounds of unfair hearing, unnecessary to set forth here, inasmuch as they do not affect the determination of the question involved. After a hearing the writ was dismissed, and petitioners thereupon perfected an appeal to the Circuit Court of Appeals. That court reversed the judgment below, and directed that the trial court "enter an order sustaining the writ and discharging relators." An application for rehearing was filed on the ground, in substance, that the judgment of the Circuit Court of Appeals should have directed the trial court to determine the right of the aliens to enter the United States instead of summarily discharging them from custody. The rehearing was denied, the court saying, in part:

> It is undoubtedly the law, that, in a habeas corpus proceeding on behalf of a Chinaman, the Chinaman is entitled to a judicial hearing for the reason that, in these cases, the relator claims admission to the United States as a citizen thereof. In a non-Chinese immigration case, however, the applicant for admission is not entitled to a judicial hearing, unless perchance (a point which has not arisen) he

should claim citizenship. The result is that on appeal in habeas corpus of an alien, such as the relator in the case at bar, we can do no more than examine into the regularity or irregularity of the proceeding. If, as here, we find the proceeding was not in accordance with law, the result is that the relator is discharged from custody. A determination of this character is not, however, *res adjudicata* and does not, in any manner, prevent the United States or its appropriate officials from again beginning proceedings against such an alien as this relator.

ARGUMENT.

The apparent error of the Court of Appeals in the case here involved lies in its assuming that an alien applying to enter the United States on the ground of citizenship is entitled to a judicial determination of that fact on habeas corpus, while an alien claiming the right to enter upon some other ground is not entitled to such a hearing of his right to enter in the event he is denied a fair hearing by the immigration officers, and for that reason is able to obtain a writ of habeas corpus. This Court has made no such distinction. The practice of requiring the trial court, in the event it found, on habeas corpus, that an alien had been denied a fair hearing, to go further and determine the right of such alien to enter the United States, finds its genesis in *Chin Yow* v. *United States*, 208 U. S. 8, 13, wherein it was said:

> The petitioner then is imprisoned for deportation without the process of law to which he

> is given a right. Habeas corpus is the usual remedy for unlawful imprisonment. But, on the other hand, as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force.

The practice there established was adhered to by this Court in *Ng Fung Ho* v. *White*, 259 U. S. 276, and *Kwock Jan Fat* v. *White*, 253 U. S. 454, 457.

The foregoing opinions indicate that the fact of claimed citizenship was not controlling, but rather accidental. Inasmuch as the same finality attaches to the finding of citizenship by the immigration officers in the case of an alien applying to enter as attaches to the finding of any other fact by such officers (*Ng Fung Ho* v. *White*, 259 U. S. 276, 282), it would be illogical and without legal basis to assert, as appears to have been done by the Circuit Court of Appeals in the case at bar, that when habeas corpus is issued on the ground of unfair hearing, the court will go further and determine the right of the alien to enter if based upon claimed citizenship, but will refuse to determine the right to enter if based upon some other ground; that its duty in the latter case, upon a finding of unfair hearing, is to immedi-

ately discharge the alien from custody. Such a practice can only result in confusion and difficulty.

It is respectfully submitted that the writ should issue as hereinbefore prayed for.

JAMES M. BECK,
Solicitor General.
JOHN W. H. CRIM,
Assistant Attorney General.
HARRY S. RIDGELY,
Attorney.

JULY, 1923.

○